Nos. 06-969 & 06-070

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION
Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.
Appellee.

SENATOR JOHN MCCAIN, ET AL.
Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.
Appellee.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE

Of counsel:

STEVEN J. LAW
CHIEF LEGAL OFFICER AND
GENERAL COUNSEL
U.S. CHAMBER OF COMMERCE

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CALEB P. BURNS
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amicus Curiae

(Additional counsel on inside cover)

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

ROBIN S. CONRAD
SENIOR VICE PRESIDENT
NATIONAL CHAMBER
LITIGATION CENTER, INC.

AMAR D. SARWAL
GENERAL LITIGATION
COUNSEL
NATIONAL CHAMBER
LITIGATION CENTER, INC.

JUDITH K. RICHMOND
VICE PRESIDENT AND
ASSOCIATE GENERAL COUNSEL
U.S. CHAMBER OF COMMERCE

1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

QUESTIONS PRESENTED*

The Federal Election Campaign Act ("FECA"), as amended by the "electioneering communication" provision of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), bans corporate speech on television or radio (transmitted by broadcast, cable, or satellite) that, 60 days before a general election or 30 days before a primary election, refers to a clearly identified federal candidate and can be received by 50,000 or more persons in the relevant district or state. 2 U.S.C. §§ 434(f)(3)(C), 441b(b)(2). *McConnell v. FEC*, 540 U.S. 93, 194, 205, 207 (2003), held that this provision (i) served the same compelling interest in limiting corporate candidate advocacy accepted by the Court in prior cases, (ii) provided a clear and objective bright line standard that satisfied heightened First Amendment vagueness concerns, and (iii) had not been proved to reach enough speech that was not candidate advocacy to render the definition of electioneering communication invalid on its face. However, *Wisconsin Right to Life, Inc. v. FEC*, 126 S. Ct. 1016 (2006) (per curiam) ("*WRTL I*"), held that *McConnell*'s facial ruling did not determine whether the electioneering communication ban constitutionally could be applied to particular types of speech, and remanded. The questions presented on this appeal from a judgment that the ban could not be applied to the grassroots lobbying ads at issue here are:

1. Does the First Amendment permit the electioneering communication ban to be applied to forbid corporate ads asking Wisconsin residents to petition their incumbent Sena-

---

* All parties have consented to the filing of this brief *amicus curiae* as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

tors, one of whom is seeking reelection, to oppose ongoing Senate filibustering of federal judicial nominations?

2. How can the principles that restrict application of the electioneering communication ban be formulated to provide practical and meaningful protection in the future?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. CORPORATE SPEECH AND PETITIONING ARE PROTECTED BY THE CORE OF THE FIRST AMENDMENT	10
II. *McCONNELL* RECOGNIZED THAT THE ELECTIONEERING COMMUNICATION STANDARD SWEEPS IN SPEECH THAT IS NOT FUNCTIONALLY EQUIVALENT TO EXPRESS ADVOCACY	14
III. AS APPLIED HOLDINGS OFTEN DO, AND IN THIS CASE SHOULD, ESTABLISH CATEGORICAL STANDARDS THAT MINIMIZE FUTURE LITIGATION	18
IV. THE WRTL ADS ILLUSTRATE A CATEGORY OF CORPORATE SPEECH TO WHICH THE ELECTIONEERING COMMUNICATION BAN CANNOT CONSTITUTIONALLY BE APPLIED	20
A. That category consists of speech that merely addresses a current legislative issue and that refers to candidates only in their capacity as incumbent elected officials with responsibility for the issue being discussed	20

TABLE OF CONTENTS—Continued

Page

B. The definition should not employ standards that deny clarity or invite delay and litigation burden 23

1. Subjective elements should be excluded.. 23

2. The PASO standard should be avoided or objectively defined 25

3. Analysis should occur within the four corners of the ad 27

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 12
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 18
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 11, 12, 25
Chamber of Commerce of the United States v. FEC, 69 F.3d 600 (D.C. Cir. 1995) 3
Chamber of Commerce of the United States v. Moore, 288 F.3d 187 (5th Cir. 2002) 3
Center for Individual Freedom v. Carmouche, 449 F.3d 655 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 938 (2007) 26
Colorado Right to Life Committee, Inc. v. Davidson, 395 F. Supp. 2d 1001 (D. Colo. 2005) 17
Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) 18
Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530 (1980) 12, 15
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 11
Edenfield v. Fane, 507 U.S. 761 (1993) 18
Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 5
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 3, 4, 9
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 12, 14, 15
Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999) 13
Kleindienst v. Mandel, 408 U.S. 753 (1972) 12, 13

TABLE OF AUTHORITIES—Continued

	Page
Martin v. City of Struthers, 319 U.S. 141 (1943)..	12
McConnell v. FEC, 540 U.S. 93 (2003)	*passim*
Mills v. Alabama, 384 U.S. 214 (1966).....	13
Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)	4
Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1 (1986)...	12
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).....	12
Republican Party of Minnesota v. White, 536 U.S. 765 (2002)	3, 5
Sosa v. DirecTV, Inc., 437 F.3d 923 (9th Cir. 2006).....	11
Thomas v. Collins, 323 U.S. 516 (1945)	23
Thornhill v. Alabama, 310 U.S. 88 (1940).....	12
United Mine Workers v. Pennington, 381 U.S. 657 (1965).....	11
United States v. Cassel, 408 F.3d 622 (9th Cir. 2005).....	25
United States v. Edge Broadcasting Co., 509 U.S. 418 (1993)	18
United States v. National Treasury Employees Union, 513 U.S. 454 (1995)	19
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).....	12
Wisconsin Right to Life, Inc. v. FEC, 126 S. Ct. 1016 (2006).....	*passim*
STATE CASES	
Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce, 597 N.W.2d 721 (Wis. 1999)	3

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES, REGULATIONS	Page
2 U.S.C. § 434(f)(3)(B)(iv)	6
2 U.S.C. § 434(f)(3)(C)	i, 4
2 U.S.C. § 437f(a)	6
2 U.S.C. § 441b(b)(2)	i, 4
11 C.F.R. § 114.10	15
The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002)	i
STATE STATUTES	
La. Rev. Stat. Ann. § 18:1483(9)(a)	26
OTHER	
71 Fed. Reg. 52295 (Sept. 5, 2006)	6
Andrew Mollison, *Votes on Guns, Marriage Slated; GOP Leaders in House Push Symbolic Bills*, Atlanta Journal-Const., Sept. 28, 2004	6
Brief of Respondents, *Voters Education Committee v. Washington State Public Disclosure Commission*, No. 77724-1 (Wash. filed Feb. 16, 2006)	26
Letter from Lawrence Norton, FEC General Counsel to Cassandra Lentchner, Attorney for Congressman Eliot Engel (Feb. 5, 2004)	6-7
Office Politics: the Growing Impact of Campaign Finance and Election Law Regulations on Corporations, Metropolitan Corp. Counsel (Dec. 2005)	19
Press Release, FEC, FEC Issues Semi-Annual Federal PAC Count (July 14, 2006)	1
Press Release, FEC, Sierra Club Agrees to Pay Civil Penalty for Violation of Federal Campaign Law (Nov. 15, 2006)	27

TABLE OF AUTHORITIES—Continued

Page

United States House of Representatives and United States Senate Roll Call Votes, 108th Congress—2d Session (2004) 6

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation with an underlying membership of over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and sectors—from large Fortune 500 companies to home-based, one-person operations. Ninety-six percent of the Chamber's underlying membership are businesses with fewer than one hundred employees. Collectively, the Chamber's members are central to our nation's economy and well-being.

Business entities are profoundly affected by federal legislation, policy, and executive action on a wide range of issues, from tort reform to taxes, intellectual property to import controls, and employment standards to environmental protection. As a result, businesses are critically interested in the formulation and implementation of federal legislation and policy and in assuring that their knowledge and concerns are fully and effectively communicated to the public, federal legislators, and other government officials. At the same time, all Americans, including American voters and government officials, have a vital interest in hearing what business corporations have to say on the key issues of the day.

Some few of the Chamber's members, particularly large corporations, maintain separate segregated funds, commonly called PACs, that permit limited direct advocacy for or against candidates. But the vast majority do not. PACs are complex and burdensome to initiate and maintain. As of July 1, 2006, there were only 1,621 PACs sponsored by corporations registered with the FEC. *See* Press Release, FEC, FEC Issues Semi-Annual Federal PAC Count (July 14, 2006), http://www.fec.gov/press/press2006/20060714paccount.html. And, only some of those PACs are sponsored by Chamber members.

When an issue arises requiring comment by a corporation that does not maintain a PAC, it often is not practical for the business to organize a PAC, solicit contributions, and then speak out in a timely fashion. Moreover, even business corporations that have PACs often will already have spent or committed their limited PAC funds to campaigns or other purposes that must receive PAC funding before the need for issue speech is discerned. Thus, business corporations have a strong interest in being able to engage in issue advocacy without the burdens and limitations of the PAC structure. And, for most, requiring them to speak through a PAC is the equivalent to banning their timely speech.

Moreover, Congress has determined that the limited sums businesses can raise and spend through the PAC process may properly be used for direct and explicit candidate advocacy. And such advocacy is a core First Amendment right. The exercise of that core right should not be impaired by requiring a corporation to divert its limited candidate advocacy funds to pay for true issue ads and grassroots petitioning that are not the functional equivalent of candidate advocacy and that the government has no compelling justification for restricting.

Public policy largely is decided by elected officials. When an active legislative issue is before incumbent officials for action, interested persons have a compelling need to address those issues and to receive speech concerning those issues. For such speech to petition effectively for redress, it must identify the government officials who will make the critical decisions. And that need does not mysteriously vanish during the lengthy blackout periods imposed by the electioneering communication ban. Yet, the electioneering communication ban, on its face, precludes much such speech.

As is discussed *infra* at 6, the Chamber joined in petitioning the FEC to conduct a rulemaking on the issues raised by this case. In addition to assisting American business thus to petition the government, the Chamber plays a key role in

advocating for the interests of its members in important matters before the courts, legislatures, and executive branches of state and federal governments. In that role, the Chamber was a party to the *McConnell* litigation challenging the facial constitutionality of the electioneering communication ban on corporate political speech that is the subject of the instant as applied challenge. The Chamber regularly files briefs *amicus curiae* where the business community's right to political speech is at stake. *See WRTL I*; *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721 (Wis. 1999); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). And the Chamber, which is incorporated, also has litigated to preserve its own First Amendment rights of speech and association. *See Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

This appeal affects the ability of the Chamber and its members to exercise their core First Amendment rights to speak to the public about active legislative issues when they are being decided and to petition for redress from incumbent elected officials who will do the deciding. Thus, the Chamber's special perspective and vital interests justify its submission of this brief *amicus curiae*.

STATEMENT OF THE CASE

The First Amendment flatly says "Congress shall make no law . . . abridging the freedom of speech . . . or the right to petition the Government for a redress of grievances." This prohibition has its fullest and most urgent application to public speech about how we govern ourselves. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). When Congress makes a law abridging such core First Amendment rights, the courts

apply strict judicial review to assure that stringent standards are met, including these:

- First, the legislation must be narrowly tailored to restrict no more core activity than is truly necessary to achieve a compelling governmental purpose. *Id.* at 41 n.48. *See also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) (distinguishing between the compelling interest *Buckley* required for limiting expenditures and the "important interest" it accepted vis-à-vis contributions).

- Second, the legislation must provide an objective bright line that permits speakers to make confident judgments in real time as to what is permitted and to avoid chilling through uncertainty speech that the government has no compelling need to bar. *Buckley*, 424 U.S. at 43-44; *McConnell*, 540 U.S. at 126, 194 (noting that *Buckley* "marked a bright statutory line separating 'express advocacy' from 'issue advocacy'" and that *Buckley*'s vagueness problem did not arise where the statutory "components are both easily understood and objectively determinable.").

Buckley and its progeny preserved several speech-restricting provisions of FECA by construing them to apply only to speech that used explicit words such as "vote for" or "defeat" to expressly advocate the election or defeat of a clearly identified federal candidate. 424 U.S. at 44 n.52; *MCFL*, 479 U.S. at 249-50 (1986). Congress concluded, however, that the law was being circumvented by speech that lacked explicit language but still was functionally equivalent to express advocacy. So, it created a new category of restricted speech called "electioneering communications," to which it gave a detailed objective definition, i.e., corporate speech broadcast via specified media to at least 50,000 voters within 30 days before a primary or 60 days before a general election. 2 U.S.C. §§ 434(f)(3)(C), 441b(b)(2).

In *McConnell*, a bare majority of this Court declined to strike the new standard down on its face. 540 U.S. at 194, 205, 207. Vagueness was not at issue since the statute's objective criteria provided as much bright line guidance as the express advocacy test. *Id.* at 194. But because the bright line criteria easily could characterize speech that was not candidate advocacy, narrow tailoring was disputed. The *McConnell* majority found that (i) the bulk of electioneering communications would be functionally equivalent to express advocacy, and (ii) the plaintiffs had not proved the new standard would encompass enough true grassroots or issue advocacy to render it facially invalid. *Id.* at 193-94, 206-07. The Court did not explain why it required the plaintiffs to prove overbreadth rather than following settled law requiring the government to prove narrow tailoring.[1]

Following *McConnell*, Congress has continued to deal with important issues during the 90 or so days that the electioneering communication standard bans most corporate broadcasts that mention any incumbent seeking reelection.[2] For example, during the 60 days before the 2006 general election, bills involving trademark dilution (H.R. 683), voter fraud (H.R. 4844), immigration reform (H.R. 6095), port security (H.R. 4954), and a constitutional amendment to

---

[1] *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) (government has "the burden to prove that the [speech restriction] is (1) narrowly tailored, to serve (2) a compelling state interest . . . [by demonstrating] it does not 'unnecessarily circumscrib[e] protected expres sion'") (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989) (challenged law could "survive constitutional scrutiny only if the State shows that it . . . is narrowly tailored.").

[2] The blackout always will be at least for the 60 days before the general election. If the relevant primary or convention is 30 days or more before the general election, the total will be at least 90 days. If there is a runoff, or if a broadcast signal reaches several relevant states, the total blackout period may be considerably longer.

balance the budget (H.J. Res. 98) all were pending before or had been voted on by at least one house of Congress. Similarly, during the 60 days before the 2004 general election, the Senate and House of Representatives held a combined 157 roll call votes.[3] Indeed, it is not unusual for legislators to maneuver to set sensitive votes in the election period. *See, e.g.*, Andrew Mollison, *Votes on Guns, Marriage Slated; GOP Leaders in House Push Symbolic Bills*, Atlanta Journal-Const., Sept. 28, 2004, at 3A.[4]

In *WRTL I*, the Court noted the FEC's rulemaking power under 2 U.S.C. § 434(f)(3)(B)(iv). *WRTL I*, 126 S. Ct. at 1017. On February 16, 2006, the Chamber joined with the AFL-CIO, the National Education Association, the Alliance for Justice, and OMB Watch in petitioning the FEC to initiate a rulemaking to promulgate an exemption from the electioneering communication ban for at least some forms of grassroots lobbying. On September 5, 2006, the FEC published its decision "not to initiate a rulemaking." 71 Fed. Reg. 52295. The FEC said it preferred to await "judicial guidance," noting that the courts would have the last say on what the First Amendment demands in any event. *Id.* at 52296.[5]

---

[3] *See* United States Senate and United States House of Representatives Roll Call Votes, 108th Cong.—2d Sess. (2004), http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm; http://clerk.house.gov/evs/2004/ROLL_400.asp; and http://clerk.house.gov/evs/2004/ROLL_500.asp (last visited Mar. 12, 2007).

[4] Thus, the systematic data collected on pages 622-26 of the Joint Appendix in *McConnell v. FEC*, 540 U.S. 93 (reproduced in the Appendix to this brief), from the 2000 election was no fluke.

[5] The Federal Election Commission's ("FEC") advisory opinion process is not a practical solution and the denial of rulemaking did not suggest it was. The Federal Election Campaign Act ("FECA") allows the agency 60 days to respond to a non-candidate inquiry. 2 U.S.C. § 437f(a). And experience shows the agency often deadlocks in close questions. *See, e.g.*, Letter from Lawrence Norton, FEC General Counsel to Cassandra

The ads of petitioner WRTL—discussed in detail in its brief and in the district court opinion—illustrate a category of core speech that the government has shown no compelling reason to suppress. This case now calls on this Court to provide a practical and effective remedy for genuine grassroots and issue advocacy that is suppressed by the lack of narrow tailoring in the electioneering communication standard.

SUMMARY OF ARGUMENT

The First Amendment squarely protects the right of corporations to petition the government for redress of grievances and otherwise to speak out on public issues. That right is vital to corporations and to members of the public who benefit from business speech and petitioning. Although this Court has accepted Congress's claim that it has a compelling need to limit some candidate advocacy by corporations, the Court has insisted that such restrictions must survive the same strict judicial scrutiny applicable to other limits on core First Amendment speech.

McConnell's surprising decision to treat the electioneering communication ban as facially valid—without requiring the government to prove it is narrowly tailored—gives heightened importance to as applied First Amendment challenges. Unless efficient and practical as applied standards are established, the electioneering communication provisions will impose a *de facto* ban on core petitioning and speech the government has no compelling need to suppress. Public discourse and policy making moves rapidly. As a practical matter, even a brief delay is as good as a ban for most

---

Lentchner, Attorney for Congressman Eliot Engel (Feb. 5, 2004) http://saos.nictusa.com/aodocs/468090.pdf (noting that a 3-3 deadlock ended the FEC's consideration of the advisory opinion request). Administrative agencies, of course, are not the institutions with primary authority to construe the Constitution, which is what an as applied challenge requires.

petitioning and speech. Efforts to limit, complicate, and delay as applied review seek to eliminate as applied relief through the back door.

This Court repeatedly has employed as applied litigation to identify categories to which a facially valid standard cannot lawfully apply. *See infra* Section III. It should do so here as well.

Indeed, to provide practical benefits, this Court's as applied holding must provide a standard that is clear enough for speakers to apply for themselves in real time. If any part of a standard invites second guessing or differing opinions, the resulting uncertainty and risk will create a *de facto* lack of tailoring. To steer clear of possible civil and criminal penalties, businesses will avoid core First Amendment petitioning or issue advocacy that the government has no compelling need to suppress.

In particular, the Court should avoid formulations such as the "promote, attack, support, or oppose" standard, which invite highly subjective second-guessing. *McConnell* did not approve that formulation except as applied to political parties, whose activities presumptively are electoral, 540 U.S. at 170 n.6, and this Court should not expand that holding to ordinary corporations.

If, for some reason, the Court cannot adopt an objective bright line, it should be explicit that its as applied standard is not a substitute for the objective bright line required to survive facial analysis under *Buckley*, but operates within the primary bright line boundary drawn by the electioneering communication standard. Clarity on this point is vital because many regulators of core speech, including the FEC, resist bright lines and seize on any language of this Court that they can construe to authorize a primary standard that turns on impressionistic views of subjective factors.

The Court also should adopt a legal standard that can be applied within the four corners of the proposed ad. The brief time frame in which petitioning and issue advocacy must occur cannot be accommodated by standards that call for discovery. And the inherently imprecise and highly discretionary standards that govern preliminary injunctions should not become the norm in a regime of judicial licensing of core speech and petitioning. Instead, the controlling standards themselves should be precise, objective, and easily applied without discovery.

The facts presented by WRTL identify one common circumstance to which the electioneering communication standard does not properly apply. From time to time, elected representatives will be dealing with an active legislative issue in the 90 days prior to an election. Affected businesses must be free to address such issues freely and to urge citizens who agree to petition their incumbent elected officials for redress, even if they happen to be seeking reelection (as incumbents often do). Foreclosing such speech for 60 to 90 days or more—an eternity in public debate—is truly Draconian.[6] And permitting such true issue speech would not threaten the interest in limiting corporate electoral advocacy relied on by *McConnell*.

The Court doubtless will receive several suggestions as to how to define a category of true grassroots petitioning and issue advocacy that the government has not established a compelling need to regulate. The district court's description

---

[6] The Chamber expects that WRTL and other participants will discuss why organizing and operating a PAC is a serious burden and often is entirely impractical. For corporations that do not have a PAC in place or whose PAC resources have been committed elsewhere, the electioneering communication provision will operate as a ban. In any event, this Court has held that subjecting core speech to substantial burden is a prohibited abridgment that must be justified by compelling necessity. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986).

of the factors it considered is a useful start. Drawing on the FEC rulemaking petition that the Chamber and other groups joined in filing, the Chamber suggests this Court should protect corporate speech where:

> (i) the "clearly identified federal candidate" is an incumbent public officeholder;
>
> (ii) the communication exclusively discusses a particular current legislative or executive branch matter;
>
> (iii) the communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so;
>
> (iv) if the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statement or reciting the candidate's official action, such as a vote, on the matter;
>
> (v) the communication does not refer to an election, the candidate's candidacy, or a political party; and
>
> (vi) the communication does not refer to the candidate's character, qualifications or fitness for office.[7]

ARGUMENT

I. CORPORATE SPEECH AND PETITIONING ARE PROTECTED BY THE CORE OF THE FIRST AMENDMENT

This Court's rulings that Congress has a compelling need to regulate certain corporate speech do not suggest that

---

[7] This final criterion may not be essential, but it was part of the group proposal. If the Court employs it, the Court should explain that this factor has to do with explicit and conclusive discussion and not with inferences that may be drawn from speech permitted by the preceding factors.

corporations lack full First Amendment protection.[8] To the contrary, this Court has been clear that the First Amendment fully and strongly protects petitioning and speech by business corporations. Thus, every restriction on such activity must be strictly scrutinized in light of the compelling interests alleged to make the restriction necessary.

The First Amendment right of business entities to petition is so firmly established it has its own name—the *Noerr-Pennington* doctrine. That doctrine was first formulated in cases giving the antitrust laws a narrow construction to avoid constitutional invalidity. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972). But it applies more broadly to prevent a wide range of statutes from impairing the right of corporations to seek redress from the government.[9]

The right of petition includes the right to involve others in the process and collectively to address government officials. *See supra* at n.9. Thus, a business's right of petition shades into its fully protected First Amendment rights of association,

---

[8] Some day the Court doubtless will wish to revisit the supposedly compelling reasons it has accepted for restricting corporate speech. The notion that using the corporate form equates to great wealth is refuted by the broad membership of the Chamber, which includes many small business corporations that work hard to achieve modest success. And the notion that federal campaign finance law should be used to protect hypothetical shareholder expectations is both highly speculative and contrary to principles of federalism. In this brief, however, the Chamber assumes the existing legal landscape.

[9] *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 934-35 (9th Cir. 2006), collects authority from this Court and the courts of appeals establishing that (i) the principle protects a broad range of corporate petitioning activity from all sorts of restraining laws, and (ii) the protection extends to speech to third parties that is reasonably ancillary to the petitioning process.

Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. at 510-11, and of free speech.

Business entities' speech on public issues is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940), and is part of "the free flow of information" the First Amendment protects, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). In case after case, this Court has held that corporate speech merits the same high level of First Amendment protection afforded to speech by individuals. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19 (1986); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657, 699-701 (1990) (unanimous as to "strict scrutiny" standard of review); *McConnell*, 540 U.S. at 330 (Kennedy, J., dissenting) ("All parties agree strict scrutiny applies . . . .").

The First Amendment protects "speech" rather than merely speakers, and the process of meaningful speech also involves listening. Thus, the right of free speech includes the right of willing listeners to receive information from willing speakers, including business corporations. *See Bellotti*, 435 U.S. at 783 ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] . . . necessarily protects the right to receive it.") (internal citation omitted). In particular, the First Amendment protects the right to receive political, social, and other information related to the functioning of government, *see Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (citing *Red Lion Broadcasting Co.*

v. FCC, 395 U.S. 367, 390 (1969)), including information about "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Without such a right, the First Amendment's universally recognized purpose of assuring free discussion of public affairs so that truth will ultimately prevail cannot be achieved. *See id.*; *Kleindienst*, 408 U.S. at 763 (citing *Red Lion Broad. Co.*, 395 U.S. at 390).[10]

In short, corporate speech on public issues receives the same high degree of First Amendment protection as speech by individuals. Although *McConnell* sustained the prohibition on corporate electioneering communications, it did so because *Buckley* had recognized "the Government has a compelling interest in regulating [corporate] advertisements that expressly advocate the election or defeat of a candidate for federal office" and electioneering communications "are the functional equivalent of express advocacy." 540 U.S. at 205-06. But that rationale implies its own limit—suppression of core speech and petitioning by business corporations must be no broader than is strictly necessary to serve the compelling interests recognized in *Buckley* and *McConnell*. Applying the electioneering communication ban to corporate petitioning and speech that is not functionally equivalent to express advocacy is unconstitutional.[11]

---

[10] As this discussion demonstrates, business discussion of issues is entitled to the highest level of protection, not the lesser protection sometimes afforded to "commercial speech." But even commercial speech is highly protected. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187-88 (1999).

[11] As noted *supra* at 1-2, the fact that Congress allows limited direct candidate advocacy via corporate PACs does not provide a rationale for limiting other core corporate speech or petitioning. First, PACs are burdensome and not established by the great majority of corporations.

II. *McCONNELL* RECOGNIZED THAT THE ELECTIONEERING COMMUNICATION STANDARD SWEEPS IN SPEECH THAT IS NOT FUNCTIONALLY EQUIVALENT TO EXPRESS ADVOCACY

Where the First Amendment's core provision is set aside to serve compelling necessity, that need must be precisely defined to mark out the limits of permissible suppression of speech. *McConnell* simply applied prior rulings finding the government had established a compelling governmental interest in limiting candidate advocacy by business corporations to protect candidate elections from corruption that threatens the link between the popular will and those who govern. 540 U.S. at 205-06 & n.88 ("unusually important interests [in] '[p]reserving the integrity of the electoral process'") (citing and quoting *Bellotti*, 435 U.S. at 788-89).

But the Court has never found a compelling need to regulate corporate petitioning or issue speech that does not advocate for or against candidates. To the contrary, it repeatedly has protected issue advocacy by business corporations. For example, *Bellotti* flatly rejected any notion that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation." 435 U.S. at 784. Emphasizing that First Amendment rights have "particular significance with respect to government," *id.* at 777 n.11, *Bellotti* held that the state had no compelling need to forbid corporate issue advocacy.

Similarly, *Consolidated Edison Co.* found no justification for preventing even a regulated corporate monopoly from

---

Second, PACs are the only way corporations may exercise, to a limited extent, the core right of candidate advocacy. Forcing corporations to divert PAC funds to grassroots petitioning or true issue advocacy would impair core speech without any compelling necessity.

addressing "controversial issues of public policy." 447 U.S. at 537. Stressing that the corporate nature of a speaker does not undermine the "inherent worth of the speech in terms of its capacity for informing the public," it forbade the state to interfere with the corporation's use of space in its billing envelopes for issue advocacy. *Id.* at 533 (quoting *Bellotti*, 435 U.S. at 777).[12]

Similarly, the *Noerr-Pennington* line of cases protect the petitioning rights of business corporations. That right has been protected against restriction by general statutes forbidding antitrust conspiracies, unfair labor practices, and a range of other purposes. *See supra* at 11.

Buckley understood that the government's legitimate concern was limited to candidate advocacy rather than true issue speech. Thus, in crafting a narrowing construction intended to cure vagueness and overbreadth, *Buckley* focused on speech using explicit words that expressly advocated the election or defeat of clearly identified candidates. 424 U.S. at 43-44.

When Congress concluded that the express advocacy standard proved ineffective in restricting corporate candidate advocacy, Congress created and *McConnell* approved the electioneering communication standard. *McConnell* concluded that issue speech was not so rigidly protected that merely adopting the form of issue speech precluded all regulation. 540 U.S. at 193. Instead, the question was one of substance: the government was equally entitled to reach so-

---

[12] The corporate form of certain nonprofit organizations is disregarded for purposes of the restrictions at issue in this case. *See* 11 C.F.R. § 114.10 (exempting *MCFL* corporations from electioneering communication ban). Like the vast majority of corporations, WRTL is not an *MCFL* organization. This case, like *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980), concerns restrictions on the speech of all corporations.

called sham issue ads that had the same function as express corporate advocacy. *Id.*

McConnell recognized the limits of its holding. In response to arguments that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications," *McConnell* responded:

> This argument fails *to the extent that the issue ads* broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy*. The justifications for the regulation of express advocacy apply equally to ads aired during those periods *if the ads are intended to influence the voters' decisions and have that effect.*

Id. at 206 (emphasis added). Thus, *McConnell* did not hold that the Government had justified suppressing all electioneering communications. Instead, the need to regulate depended on whether the ads, in fact, functioned as express advocacy.

Ironically, having held that the government's need to suppress speech was determined by its substance—functioning as candidate advocacy—*McConnell* sustained an electioneering communication standard that, unlike the express advocacy standard, turned on issues of form. *Id.* Although *McConnell* concluded that the formal incidents specified by the electioneering communication standard often are markers for candidate advocacy, the Court recognized this is not always so. *Id.* at 206-07. In this significant respect the electioneering communication standard differed from the express advocacy standard—speech that uses explicit language to expressly advocate the election or defeat of a clearly identified candidate inherently will be candidate advocacy.

McConnell acknowledged that "the interests that justify the regulation of campaign speech might not apply to the regu-

lation of *genuine issue ads*." *Id.* at 206 n.88 (emphasis added).[13] In fact, the record in *McConnell* included evidence of such genuine issue speech by corporations. *See, e.g.*, *McConnell* J.A. at 328 (the Chamber supported ads "that urged Senator Daschle to schedule a Senate vote on Eugene Scalia's nomination as Solicitor of Labor"), 286 (the National Association of Manufactures ran ads supporting the President's tax proposal and "referred to the proposal as being that of the President").

Nonetheless, the Court held the electioneering communication standard was not facially void because "the vast majority" of ads within its language were the "functional equivalent" of express advocacy. *McConnell*, 540 U.S. at 206; *see also Colo. Right to Life Comm., Inc. v. Davidson*, 395 F. Supp. 2d 1001, 1020 (D. Colo. 2005) ("if the government wishes to justify a regulation of corporate political activity under [*McConnell*], it must demonstrate that the regulated activity is 'the functional equivalent of express advocacy.'"). *McConnell* did not discuss, however, whether the government had shown the statute to be narrowly tailored. Instead, it held that the plaintiffs had not proved the electioneering communication standard to be intolerably overbroad. 540 U.S. at 207. As noted above, this was a surprising departure from settled precedent placing the burden on the government to prove narrow tailoring. *See supra* at 5.

In sum, *McConnell* approved regulation of electioneering communications only to the extent they constituted the functional equivalent of express candidate advocacy. *McConnell* did not find any compelling need to suppress genuine

---

[13] Context makes clear that *McConnell* uses "genuine issue ads" to distinguish speech that is the "functional equivalent" of express advocacy. To illustrate the "so-called issue advocacy" targeted by the electioneering communication standard, *McConnell* quoted an ad that accused a candidate of beating his wife and failing to support his children. 540 U.S. at 193-94 n.78.

corporate issue speech, recognized that such speech might well be suppressed by the electioneering communication ban, and held that the plaintiffs there had not proved how much such speech might exist.

III. AS APPLIED HOLDINGS OFTEN DO, AND IN THIS CASE SHOULD, ESTABLISH CATEGORICAL STANDARDS THAT MINIMIZE FUTURE LITIGATION

Public discourse moves swiftly. And while the legislative process is ponderous, the moments where grassroots petitioning may make a difference often are fleeting. Thus, there would be little benefit from a holding here that left future business speakers with nothing more than a ticket to a lengthy lawsuit.

But that need not be the result. Instead, as applied challenges regularly are used by this Court to establish standards, tests, and categories that provide meaningful future protection without litigation for entire categories of speech.

For example, *Edenfield v. Fane*, 507 U.S. 761 (1993), entertained a challenge to promotional activities by Certified Public Accountants. The Court accepted that there could be a need to protect individuals from such activities. But because businesses tend to be more sophisticated and less vulnerable, the Court held that "as applied to CPA solicitation in the business context," the statute violated the First Amendment. *Id.* at 763; *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 431 (1993) (*Fane* sustained an "as applied challenge to a broad category of commercial solicitation"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (holding an obscenity statute invalid as applied to some definitions of "lust" but not others).

Similarly, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 620-22 (1996), held that general

spending restrictions could not be applied to "independent expenditures" by political committees. And *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), held that a restriction on honoraria violated the First Amendment as applied to federal employees in lower pay grades. There, although Justice O'Connor's partial dissent preferred to describe a different category of protected speech, she accepted the basic approach, saying:

> There is a commonsense appeal to the Government's argument that, having deemed a particular application of a statute unconstitutional, a court should not then throw up its hands and despair of delineating the area of unconstitutionality.

513 U.S. at 486.

The Court must decide how broadly the record and presentation of a particular as applied challenge allows the Court to rule. But to the extent it can, the Court should address this case in a way that provides clear and practical guidance for the future.

Such an approach is particularly important because of the nature and importance of the rights at stake. As *Buckley* recognized, core First Amendment activity is easily chilled by the threat of criminal or civil penalties. 424 U.S. at 41 n.48. That is particularly true of America's businesses, the vast majority of which take great pains to avoid even the appearance of a violation and tend to steer far wide of any possible violation. *See, e.g.*, *Office Politics: the Growing Impact of Campaign Finance and Election Law Regulations on Corporations*, Metropolitan Corp. Counsel 35 (Dec. 2005). As a result, uncertainty in the law regulating corporate petitioning and speech imposes a *de facto* ban on speech the government has no need to restrict. *See Buckley*, 424 U.S. at 41 n.48.

IV. THE WRTL ADS ILLUSTRATE A CATEGORY OF CORPORATE SPEECH TO WHICH THE ELECTIONEERING COMMUNICATION BAN CANNOT CONSTITUTIONALLY BE APPLIED

The specific circumstances presented by WRTL illustrate a category of corporate speech to which the electioneering communication standard cannot constitutionally be applied.[14] In defining that category, the Court should reject criteria that have the practical effect of defeating as applied protection for speech and petitioning.

A. That category consists of speech that merely addresses a current legislative issue and that refers to candidates only in their capacity as incumbent elected officials with responsibility for the issue being discussed.

In the FEC rulemaking petition, the Chamber and other petitioners suggested that one category of corporate speech to which the electioneering communication standard does not properly apply has the following defining characteristics: (i) the "clearly identified federal candidate" is an incumbent public officeholder; (ii) the communication exclusively discusses a particular current legislative or executive branch matter; (iii) the communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; (iv) if the communication discusses the

[14] Of course, there is no need for the Court to identify all categories to which a standard may not be applied. The Court may proceed incrementally as particular challenges illuminate particular categories that should be protected from the general rule. However, given the First Amendment imperative to suppress no speech unnecessarily, the Court should not be unduly restrained in identifying the categories or principles that justify as applied protection.

candidate's position or record on the matter, it does so only by quoting the candidate's own public statement or reciting the candidate's official action, such as a vote, on the matter; (v) the communication does not refer to an election, the candidate's candidacy, or a political party; and (vi) the communication does not refer to the candidate's character, qualifications or fitness for office.[15]

A legislative issue is current at least when it is pending for action during the electioneering communication blackout period or is likely to be so in the near future. For example, the judicial filibuster issue addressed by the WRTL ads was active because filibustered nominations were pending in the Senate, the Senate remained in session, and Senators were actively considering potential solutions. Such a current legislative issue urgently and logically justifies discussion during the blackout period and is not mere "past history" dredged up as a pretext for candidate advocacy.

Incumbent legislators who have responsibility for acting on such an active issue are logical and necessary persons to be named in such issue discussions. By contrast, there is little need to identify a candidate who does not hold office at the time. In the case of the WRTL ads, whom else should viewers in Wisconsin petition to end judicial filibusters than their own elected Senators? Referring to elected representatives only in that role, and not as candidates or the subject of electoral exhortation, allows effective petitioning without inviting candidate campaigning.

---

[15] This definition accommodates the same concerns as the district court's reference to whether the ad "exhorts the listener to do anything other than contact the candidate about the described issue," Appendix to the Jurisdictional Statement ("J.S. App.") 22a, except it makes clear the issue itself may be analyzed and that the call for action may be broader than simply contacting the candidate. For example, if the WRTL ad had said "write your newspaper, talk to your neighbors, and call your Senators to tell them . . . ," it still would have been a genuine issue ad.

Quoting a candidate's own public statements, or reciting his or her own official acts, without further commentary, can provide useful context and explain why a grassroots contact to that person makes sense. And such a presentation does not threaten the rationale of *McConnell*.

A holding that used such elements to identify true issue advocacy would be clear enough to permit substantial real time application by corporations and to permit swift adjudication if thought necessary.[16] It would not be clear enough to replace the bright line that this Court holds essential to regulating core speech, *Buckley*, 424 U.S. at 42-44. However, operating within the bright line established by the electioneering communication standard, it will mitigate that standard's lack of narrow tailoring and protect at least some core petitioning and speech Congress has no compelling need to regulate.

To a limited but vital extent, such a ruling would restore the core First Amendment right of the Chamber and other business organizations to speak out on active legislative issues of importance to the business community whenever they arise. *See supra* at 17 (regarding ads urging Senate votes on federal nominees and ads supporting the President's proposed tax plans). It also would avoid incentivising incumbent federal office holders to shield their official acts from public criticism by scheduling them during the electioneering communication blackout period.

---

[16] WRTL offers a list of further criteria confirming that its proposed speech would not justify suppression. The Chamber submits that most of these factors simply are not necessary and would pointlessly circumscribe this Court's delineation of the protected category.

B. The definition should not employ standards that deny clarity or invite delay and litigation burden.

The *WRTL* district court's analysis mentioned several other considerations in concluding that the electioneering communication ban could not constitutionally be applied to the WRTL ads. If the Court deems any such elaboration necessary, it will be critical to avoid any formulation that denies clarity or invites delay and litigation burden.

1. *Subjective elements should be excluded.*

The district court explicitly and wisely declined to make protection turn on its assessment of WRTL's organizational motives or on the predicted perceptions of possible viewers of the ads. Many considerations support this outcome.

As *Buckley* discussed, speakers cannot be expected to predict with confidence how subjective factors will be judged or what predicted reactions will be attributed to their audiences. 424 U.S. at 43. In that case, the D.C. Circuit had proposed to define the statutory phrase "relative to" an election to mean speech "advocating the election or defeat of a candidate." *Id.* at 42.

Buckley held such a standard to be unconstitutionally vague because speakers could not confidently predict how their "intent" would be assessed, or what "effect" their speech might be deemed to have. *Id.* at 42-43. Such a test "puts the speaker . . . wholly at the mercy of the varied understandings of his hearers and consequently of whatever inferences may be drawn as to his intent and meaning." *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). It "offers no security for free discussion [and] . . . blankets with uncertainty whatever may be said." *Id.* It compels the speaker to "hedge and trim," *id.*, and to "steer far wider . . . than if the

boundaries of the forbidden areas were clearly marked," *id.* at 41 n.47 (quoting and citing other authority).[17]

Motive is a particularly problematic consideration with respect to corporations or similar organizations that are controlled by and act through multiple individuals with potentially differing goals. How should subjective hopes of various corporate officers, executives, directors, and shareholders be weighed to determine the motives of a corporation? And how can a corporate decision-maker be confident that he or she knows the subjective positions of everyone involved? The fact that such a judgment is required for purposes of some laws does not alter the fact that organizational motive is difficult to assess and is a very undesirable standard for an area where bright lines are essential.

Moreover, because motives and predicted reactions are not observable, objective facts, they invite extensive discovery to find inferential proof. Many speakers would rather stand silent than accept intrusive and burdensome document production and depositions. Moreover, as already noted, the time required by such discovery often will make as applied relief illusory.

Finally, it is difficult to identify a compelling interest that turns on a speaker's subjective motivations.[18] Admittedly,

---

[17] The extent to which this Court has found First Amendment considerations to demand greater precision than due process generally turns on how close the speech that may be chilled by deterrence lies to the core of the First Amendment's protections. It has been somewhat less concerned, for example, that imprecision in the definition of obscenity may chill some near obscenity, or that imprecision in defining the additional factors that convert false speech into defamation may chill some false speech that is not strictly defamatory, though even in these areas it strives for precision. In the present context, all potentially chilled speech and petitioning lies at the heart of the First Amendment and, hence, must receive maximum protection from *de facto* prohibition via uncertainty.

McConnell repeatedly referred to the "intent" of "sham" ads. But it did so to determine the likely characteristics of an entire class of activity, not as a standard to be applied to regulate specific speech. The standard that was approved was the electioneering communication standard, not an *ad hoc* assessment of motive, intent, or predicted effect. This Court should strive to provide bright line guidance.[19]

2. *The PASO standard should be avoided or objectively defined.*

The district court considered whether the ad text "promotes, attacks, supports, or opposes" the named candidate. Appendix to the Jurisdictional Statement ("J.S. App.") at 22a. Facially, this standard invites inferences about the speaker's subjective intent or likely viewer reaction. For the reasons just discussed, this PASO standard would be very troubling.

The *Brief for Amici Curiae The League of Women Voters, et. al.*, demonstrates (at 10-12) that the PASO standard has been upheld only with respect to political parties, and clearly fails the "much stricter vagueness standard" that *Buckley* demanded in other contexts. Indeed, the natural meaning of the terms involves predictions about subjective intent and predicted understanding that the district court sought to avoid.

---

[18] A subjective intent element may assure that a speaker is aware of the objectionable quality of speech, and thus minimize chill. *See United States v. Cassel*, 408 F.3d 622, 631-33 (9th Cir. 2005) (discussing authorities on the role of intent); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972) (holding that the sham exception to *Noerr-Pennington* protection required proof of both objective baselessness and objective bad faith). The intent element here, however, is being proposed to increase—rather than reduce—uncertainty.

[19] Bright lines are important to avoid suppression through uncertainty of speech that Congress has no compelling need to suppress. It would be a perversion to hold that Congress could suppress more speech than otherwise to provide a bright line. The ultimate objective must be to suppress no more speech and petitioning than is essential.

If the Court's goal is to define a category with sufficient clarity that most speakers can apply it for themselves in real time, and that the FEC and courts can apply swiftly and consistently when disputes arise, the PASO standard falls short for all the reasons *Buckley* explained and the *League of Women Voters* brief discusses.

Alternatively, if the Court concludes that the PASO standard or something like it is necessary, it should make clear that the standard requires an objective assessment within the four corners of the ad and does not permit speculation over what might have been intended or what might be perceived. The advocacy should be clear and certain on the face of the ad.

The Chamber also respectfully urges the Court to state expressly it is not adopting any such formula as a primary standard that could substitute for the electioneering communication or express advocacy standards. This is critical because (i) many state campaign finance statutes around the country continue to use the same vague language that *Buckley* construed to require express advocacy as well as elements of the PASO standard, e.g., La. Rev. Stat. Ann. § 18:1483(9)(a) ("'Expenditure' means . . . anything of value made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office . . ."); (ii) already, *McConnell* has been misconstrued to hold that "holistic" approaches like PASO are sufficient when regulating political speech, e.g., *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 938 (2007); (iii) similar arguments are common in state proceedings, e.g., Brief of Respondents at 20, *Voters Education Committee v. Washington State Public Disclosure Commission*, No. 77724-1 (Wash. filed Feb. 16, 2006) (citing *McConnell* for the proposition that "the United States Supreme Court has determined that the particular terms 'support' and 'oppose' are not vague"); and even the FEC

has misconstrued *McConnell* to relax *Buckley*'s vagueness standard, e.g., Press Release, FEC, Sierra Club Agrees to Pay Civil Penalty for Violation of Federal Campaign Law (Nov. 15, 2006), http://www.fec.gov/press/press2006/2006 1115mur.html.[20]

The Chamber does not ask this Court to address these other situations. Instead, it asks the Court to make explicit the limits on any role that it may approve for a PASO type standard here.

3. *Analysis should occur within the four corners of the ad.*

The district court said it was limiting its analysis to the four corners of the ad, explaining that a broader analysis would reduce uncertainty and invite litigation delay. J.S. App. 19a-22a. More precisely, the court examined the four corners of the ad in light of information about Congressional activity that could be judicially noticed, e.g., whether judicial filibustering was an active issue.

The definition the Chamber proposes above lends itself to a similarly focused analysis, with the caveat that the court's judicial notice should not be aggressive in second-guessing the existence of an active legislative issue. If objective facts such as pending bills, statements from legislative leaders, or similar sources indicate an issue is or shortly will become active, that should suffice.

---

[20] The sixth factor proposed by the Chamber above, *supra* at 20-21, is that the "communication does not refer to the candidate's character, qualifications, or fitness for office." This standard is intended to be applied strictly, and not to allow regulators to "infer" that a candidate is implicitly criticized. With the other elements in place, such a strict standard does not invite the easy circumvention of the express advocacy standard and avoids the uncertainty of a PASO standard. The Court may conclude that this sixth factor is not essential.

This four corners approach is vital for at least two reasons. First, it provides a fixed basis for self application and real time judgments. One certainty about both elections and public discourse is that circumstances change rapidly. A speaker cannot be sure that the facts existing when an ad is planned will exist when it has been produced, distributed and run. Nor can a speaker be sure what surrounding facts a regulator later may deem significant.

Second, if pre-speech litigation is thought necessary, it allows some hope that a result can be achieved within a useful time frame. From 40,000 feet it may seem like a district court should be able to target, expedite, and conclude discovery promptly, but that is not the real world. To begin with, federal courts have many conflicting demands, including criminal matters that have a constitutional claim to expedition under the Sixth Amendment's speedy trial guarantee. Moreover, the defendant typically will be the government, and for a variety of reasons, such litigation always moves slower. Some extraordinary judges may achieve speedy discovery in some exceptional cases, but core First Amendment rights should not be held hostage to the need for such extraordinary efforts unless there is no other alternative.

These difficulties cannot be avoided by placing primary reliance on temporary restraining orders or temporary injunctions. Such procedures themselves take time. Moreover, they are inherently imprecise and approximate, and vest a large quantum of discretion in the district judge. Such interlocutory procedures are a vital backstop, but they should not become a primary method for vindicating core First Amendment rights.

Importantly, in the context of the definition the Chamber has proposed, a four-corners standard does not amount to a revived express advocacy test. The limits of express advocacy were entirely avoided so long as a narrow class of words did not appear. By contrast, the other elements of the Chamber's

suggested standard allow only a few limited types of information to be included. The record contains no evidence that a four-corners approach would result in such ads being used as the functional equivalent of express advocacy.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be affirmed and the Court should hold that the electioneering communication ban cannot constitutionally be applied to corporate speech where (i) the "clearly identified federal candidate" is an incumbent public officeholder; (ii) the communication exclusively discusses a particular current legislative or executive branch matter; (iii) the communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; (iv) if the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statement or reciting the candidate's official action, such as a vote, on the matter; (v) the communication does not refer to an election, the candidate's candidacy, or a political party; and (vi) the communication does not refer to the candidate's character, qualifications or fitness for office.

Respectfully submitted,

Of counsel:

STEVEN J. LAW
CHIEF LEGAL OFFICER AND
GENERAL COUNSEL
U.S. CHAMBER OF COMMERCE

ROBIN S. CONRAD
SENIOR VICE PRESIDENT
NATIONAL CHAMBER
LITIGATION CENTER, INC.

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CALEB P. BURNS
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amicus Curiae

AMAR D. SARWAL
GENERAL LITIGATION
COUNSEL
NATIONAL CHAMBER
LITIGATION CENTER, INC.

JUDITH K. RICHMOND
VICE PRESIDENT AND
ASSOCIATE GENERAL COUNSEL
U.S. CHAMBER OF COMMERCE

1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

March 23, 2007

APPENDIX

APPENDIX

106th Congress
Congressional Action During the 60 Days Prior to November Election on Bills of interest to the ACLU

Capital Punishment:

- "Sense of Congress" regarding the obligation of grantee states to ensure access to post-conviction DNA testing and competent counsel in capital cases (Amdt. 4345 to S. 3045): Introduced in the Senate on 10/26/2000.

Chruch-State: [sic]

- Bill to protect religious groups in land-use disputes (S 2869) signed by the President on 9/22/2000; P.L. 106-274.
- Allows faith-based organizations to receive federal support for programs to help low income fathers get more involved in their families' lives (HR 4678): Passed House 9/7/2000.

Criminal Justice:

- Provide grants to states to process backlog of DNA evidence (HR 4640): Passed House 10/2/2000.
- Pressure states into requiring HIV testing of rape suspects who have been formally charged, by threatening to withhold federal crime-fighting block grant money (HR 3088): Passed House 10/2/2000.
- Aimee's Law: cuts federal crime fighting money to states if convicted murderers & rapists did not serve stiff sentences and went on to commit offense in another state (part of HR 3244): Passed Senate 10/11/2000.

Gay and Lesbian Issues:

- Repeal federal charter of Boy Scouts, in reaction to Supreme Court: decision that allows Boy Scouts to discriminate against homosexuals (HR 4892): Defeated in House 9/13/2000.
- Prohibit using local or federal funds for needle exchange (amendment to HR 4942): Passed House 9/27/2000.
- Prohibit the use of Federal funds for the conduct or support of programs of HIV testing that fail to make every reasonable effort to inform the individuals of the results of the testing (HR 5615): Introduced in the House on 10/11/2000.

Hate Crimes:

- Expansion of federal hate crimes law (amendment to S 2549): House voted to instruct conferees to accept amendment 9/13/2000; conferees dropped language from bill 10/5/2000.

Immigration:

- Allow some immigrants who committed minor crimes long ago to apply to stay in US and not be deported; part of "Fix '96" (HR 5062); Passed House 9/19/2000.

Internet Filtering

- Force schools and libraries to use technology protection measures to block access by children to web pornography (amendment to HR 4577): Conferees added this provision to the bill 10/23/2000.

Media & Violence

- Require violent TV programming be limited to hours when children are not likely to be a substantial part of audience (S 876): Approved by Senate Commerce committee 9/20/2000.

Physician-Assisted Suicide:

- Overturns Oregon's law that permits physician-assisted suicide (amendment to HR 2614): Passed House 10/26/2000; Filibustered in Senate 10/27/2000.

Privacy:

- Restrictions on law enforcement use of electronic surveillance (HR 5018): Approved by House Judiciary subcommittee 9/14/2000; Mark-up by House Judiciary committee 9/20/2000.
- Creation of commission to study issue of privacy on the internet (HR 4049): Defeated in House 10/2/2000: failed to get 2/3's majority needed for passage under suspension of rules.
- Prohibit the appearance of Social Security account numbers on or through unopened mailings of checks (HR 3218): Passed House 10/18/2000; Passed Senate 10/25/2000.
- Enhance privacy protections for individuals, and to prevent fraudulent misuse of Social Security account numbers (HR 4857): House full committee mark up on 9/28/2000.

Reproductive Rights:

- Funding prohibition in DC Approp. (HR 4942; HR 5633): Passed both House and Senate on 11/14/2000.

- "Conscience clause" to employee-sponsored health plans coverage of contraceptives (amendment to HR 4942): Passed House 9/14/2000.
- Abortion restrictions on international family planning aid (HR 4811): Conference Committee appointed 10/19/2000; House debates conference report 10/25/2000;
- Define "human being;" seeks to protect humans born alive at any stage of pregnancy (HR 4292): Passed House 9/26/2000.
- Prevent abortion protestors convicted of violent crimes from seeking bankruptcy protection to avoid paying hefty legal penalties (amendment to S 3046): Senate voted to proceed with debate on 10/19/2000.
- Prohibit use of funds to distribute postcoital emergency contraception "morning after pill" on elementary or secondary school premises (HR 4577, Labor/HHS Approp.): Pre. Coburn announces intention to offer motion to instruct House conferees on this amendment on 9/18/2000.

Secret Evidence

- Makes it harder for INS to use secret evidence to deport immigrants or to deny tem [sic] asylum (HR 2121): Approved by House Judiciary Committee 9/26/2000.

Terrorism

- Provide clearer coverage over threats against former Presidents and members of their families (HR 3048): House disagreed with certain Senate amendments on 10/25/2000.

Trafficking Victims:

- Combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions (HR 3244): Passed Senate 10/11/2000.

Violence Against Women:

- Reauthorization of VAWA (HR 1248): Passed House 9/26/2000; Passed Senate as par [sic] of HR 3244 0/11/2000 [sic].

Voting Reform

- Proposing a constitutional amendment to abolish the electoral college and to provide for the direct popular election (SJRes 56): Introduced in the Senate on 11/01/2000. Proposing a constitutional amendment to abolish the electoral college (HJRes 113): Introduced in the House on 10/12/2000.